WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHARLESETTA WILEY, *Applicant*

vs.

AT&T, administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ8902701
Van Nuys District Office

OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on May 28, 2021. By the F&O, the WCJ concluded that the November 16, 2020 independent medical review (IMR) determination is presumed correct and will not be set aside per Labor Code[1] section 4610.6(h). (Lab. Code, § 4610.6(h).)

Applicant contends that the WCJ improperly based the decision on documents that were not part of the evidentiary record, defendant intentionally withheld additional records from IMR and the IMR reviewer applied the incorrect guidelines to the recommended treatment.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Applicant's Attorney's Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, rescind the F&O and issue a new decision finding that the IMR determination was the result of a plainly erroneous finding of fact and was in excess of the Administrative Director's (AD) powers. We will also order the AD to submit the IMR application to a different independent review organization or different reviewer.

[1] All further statutory references are to the Labor Code unless otherwise stated.

FACTUAL BACKGROUND

In 2015, the parties stipulated that applicant sustained injury to the cervical spine, bilateral shoulders, bilateral elbows and bilateral carpal tunnel from November 6, 2011 to November 6, 2012 while employed as a service manager/customer relations by AT&T. (Stipulations with Request for Award, April 9, 2015, pp. 4-5.) The parties also stipulated that the injury caused 36% permanent disability and there is a need for future medical treatment. (*Id.* at p. 6.) Applicant filed a Petition to Reopen for New and Further Disability in 2016.

Sally Glade, R.N. conducted a home health care evaluation of applicant's residence in April 2018 "to determine the level of medically necessary home assistance." (Applicant's Exhibit No. 2, Sally Glade In-Home Assessment, April 17, 2018, p. 1.) In her resulting April 17, 2018 report, Ms. Glade stated:

> Prior to her injury, Ms. Wiley was very active with both her job and outside activities. Since her last day of work in May, 2017, she has progressively had more pain throughout her body and was diagnosed with fibromyalgia. She lives alone and so she does not have the help she needs and thus she is unable to care for herself appropriately. This is shown by her frequent need for increased insulin because of her elevated glucose levels. She is unable to provide appropriate diabetic meals for herself. She also relies on her son or her mother for help with cleaning her home and also doing her laundry. Prior to her disability she did all her own cooking, cleaning, and laundry.
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> After my assessment I believe that Ms. Wiley requires about four hours of unskilled home care, seven days per week to assist her with obtaining appropriate diabetic nutrition, purchasing groceries, cleaning her home, and doing her laundry. Additionally she should be provided with transportation for longer distances or when she is not up to driving due to her strong pain.
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> (*Id.* at p. 5.)

David Heskiaoff, M.D. evaluated applicant as the orthopedic agreed medical evaluator (AME). Dr. Heskiaoff's evaluation in 2020 included review of Ms. Glade's 2018 home health care assessment. (Applicant's Exhibit No. 5, Report of Dr. David Heskiaoff, March 3, 2020, p. 9.) In his March 4, 2020 report, Dr. Heskiaoff stated as follows:

> The nurse who evaluated her for the home situation, Sally Glade, R. N., has recommended healthcare help for this patient. She has recommended 4 hours unskilled home care, 7 days a week. I believe that this is a reasonable recommendation and should be carried out to help the patient.
> (*Id.* at p. 22.)

Jalil Rashti, M.D. provides treatment to applicant as her primary treating physician (PTP). On September 9, 2020, Dr. Rashti submitted a request for authorization (RFA) for various treatment modalities, including home care 4 hours per day, 5 days per week for the next 6 months. (Applicant's Exhibit No. 4, Report and RFA of Dr. Jalil Rashti, September 9, 2020.)

On September 16, 2020, defendant issued a utilization review (UR) decision denying Dr. Rashti's recommendation for home care. (Defendant's Exhibit A, UR Denial of HHC request, September 16, 2020.) Applicant submitted an application for IMR of the UR decision to DWC/IMR, Maximus Federal Services, Inc. (Defendant's Exhibit C, IMR Determination, November 16, 2020.)

Maximus issued a final determination letter on November 16, 2020 in response to applicant's IMR application. (Defendant's Exhibit C, IMR Determination, November 16, 2020.) The IMR determination (CM20-0142336) upheld the UR non-certification for home care. (*Id.* at p. 1.) Medical records reviewed by the IMR reviewer included the following provided by the claims administrator: David Heskiaoff, M.D. from 3/4/2020, Jack Rothberg, M.D. from 4/9/2020, Jalil Rashti, M.D. from 3/11/2020 to 10/7/2020 and Perry Maloff, M.D. from 5/1/2020 to 8/24/2020. (*Id.* at p. 2.) Applicant's attorney also provided records to the IMR reviewer from Jalil Rashti, M.D. from 6/17/2020 to 9/9/2020. (*Id.*)

The IMR determination stated in relevant part:

> There was no clear rationale for the current requests.
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> Per the clinical note dated 09/09/2020, which was handwritten and difficult to decipher, the injured worker reported thumb and hand pain as well as neck pain. Physical examination findings included tenderness and decreased range of motion with positive Hawkins and Neer's and swelling.
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> (*Id.*)

With respect to the home care recommendation, the IMR determination cited to the 2017 MTUS[2] and provided the following rationale for upholding the UR decision on this recommendation:

> According to California MTUS Guidelines, home healthcare is selectively recommended on a short-term basis following hospitalization and major surgical

[2] "MTUS" stands for the "medical treatment utilization schedule" guidelines, which are "presumptively correct on the issue of extent and scope of medical treatment." (Lab. Code, § 4604.5(a); see also Cal. Code Regs., tit. 8, § 9792.21(c).)

> procedures. Indications include the injured worker is unable to leave the home without major assistance, leaving home is not medically advised because of the occupational illness or injury; and the injured worker is normally unable to leave home and leaving home is a major effort. Per the submitted documentation, the injured worker reported pain of the thumb and right hand as well as neck pain. Physical examination findings included tenderness, decreased range of motion and positive Hawkins and Neer test. A request was received for home care. However, there was a lack of objective evidence indicating the injured worker was considered homebound. Additionally, there was no clear rationale for the need of treatment for 6 months without documentation of assessments or efficacy. As such, the request for Home care 4 hours, per day for *5* days per week for next 6 months (480 hours) is not medically necessary.
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> (*Id.* at p. 4.)

Applicant timely appealed the IMR determination pursuant to section 4610.6(h) on December 16, 2020. (Applicant's Exhibit No. 1, IMR Appeal, December 16, 2020.)

The matter proceeded to trial on May 3, 2021 on the following issues:

> 1. Is the IMR invalid for not reviewing the proper information?
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> 2. Is the IMR invalid for not using the correct standard for ancillary services?
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> 3. Is the IMR in violation of Labor Code Section 4610.6(h)(5)?
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> 4. Is applicant's failure to tender additional information a defect that can be cured by an appeal of IMR to the WCAB?
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> (Minutes of Hearing, May 3, 2021, p. 2.)

The WCJ issued the resulting F&O as outlined above. Applicant only appears to take issue with the denial of the PTP's recommendation for home health care. Therefore, our analysis will be restricted to whether the IMR determination for this recommendation may be set aside.

DISCUSSION

The employer is required to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600.) Employers are further required to conduct UR of treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236.) Section 4610.5 mandates IMR for "[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury." (Lab. Code, §

4610.5(a)(2); see also Lab. Code, § 4062(b) [an employee's objection to a UR decision to modify, delay or deny an RFA for a treatment recommendation must be resolved through IMR].)

Section 4610.6(h) authorizes the Appeals Board to review an IMR determination of the AD. The section explicitly provides that the AD's determination is presumed to be correct and may only be set aside by clear and convincing evidence of one or more of the following: (1) the AD acted without or in excess of his or her powers, (2) the AD's determination was procured by fraud, (3) the independent medical reviewer had a material conflict of interest, (4) the determination was the result of bias based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, or (5) the determination was the result of an erroneous finding of fact not subject to expert opinion. (Lab. Code, § 4610.6(h).)

In upholding a challenge to the constitutionality of section 4610.6, the Court of Appeal held that IMR determinations are subject to meaningful review, even if the Appeals Board cannot change medical necessity determinations:

> The Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. (§ 4610.6, subd. (h)(1) & (5).) These grounds are considerable and include reviews of both factual and legal questions. If for example, an IMR determination were to deny certain medical treatment because that treatment was not suitable for a person weighing less than 140 pounds, but the information submitted for review showed the applicant weighed 180 pounds, the Board could set aside the determination as based on a plainly erroneous fact. Similarly, the denial of a particular treatment request on the basis that the treatment is not permitted by the MTUS would be reviewable on the ground that the treatment actually *is* permitted by the MTUS. An IMR determination denying treatment on this basis would have been adopted without authority and thus would be reviewable.
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> (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1100-1101 [80 Cal.Comp.Cases 1262].)

In this matter, applicant argues that insufficient medical records were provided to IMR. Specifically, applicant contends that it was improper for defendant to exclude Ms. Glade's in-home assessment or Dr. Rashti's September 9, 2020 RFA from the records provided to IMR. Section 4610.5(l)(1) requires the employer to provide to IMR all records relevant to applicant's current medical condition and the medical treatment being provided by the employer. (Lab. Code, § 4610.5(l)(1); see also Cal. Code Regs., tit. 8, § 9792.10.5.) There is no statutory or regulatory obligation on applicant to submit medical records to the IMR organization.

Ms. Glade's assessment was highly relevant to Dr. Jashti's recommendation for home health care, but was not provided to IMR. Whether this record was intentionally excluded from disclosure to IMR by defendant is not germane to our analysis. Based on the circumstances here, there is clear and convincing evidence that the IMR determination was the result of plainly erroneous findings of fact as a matter of ordinary knowledge and not a matter that is subject to expert opinion as described in section 4610.6(h)(5). By failing to provide the IMR reviewer with all material and relevant medical records to the disputed treatment, the determination of the IMR organization, and thus the AD, was without or in excess of its powers per section 4610.6(h)(1).

The Court of Appeal in *Stevens* recognized that the Appeals Board may provide a remedy in this situation per section 4610.6(i). (*Stevens*, *supra*, 241 Cal.App.4th at pp. 1100-1101.) Section 4610.6(i) provides in pertinent part as follows:

> If the [IMR] determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization.
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> (Lab. Code, § 4610.6(i).)

In conclusion, we will grant reconsideration, rescind the F&O and issue a new decision finding that the IMR determination was the result of a plainly erroneous finding of fact and was in excess of the AD's powers. We will also order that applicant's IMR appeal is granted and order the AD to submit the IMR application to a different independent review organization or different reviewer as provided in section 4610.6(i).[3]

[3] The F&O included orders admitting applicant's Exhibits Nos. 2-3 into evidence despite defendant's objections to these exhibits at trial. This ruling was not challenged and will be retained in the new decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on May 28, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued by the WCJ on May 28, 2021 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDING OF FACT

1. The November 16, 2020 Independent Medical Review determination of the Administrative Director was the result of a plainly erroneous finding of fact and was in excess of the Administrative Director's powers per Labor Code sections 4610.6(h)(1) and 4610.6(h)(5).

ORDERS

1. Applicant's Exhibit 2, Sally Glade In-Home Assessment dated April 17, 2018 is admitted into evidence.

2. Applicant's Exhibit 3, Report of Dr. Seymour Levine dated June 20, 2019 is admitted into evidence.

3. Applicant's appeal of the November 16, 2020 Independent Medical Review determination is granted.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that applicant's dispute with defendant's September 16, 2020 Utilization Review decision denying home care is **REMANDED** to the Administrative Director pursuant to Labor Code section 4610.6(i) for submission of the dispute to a different independent review organization, or if a different independent medical review organization is not available after remand, the Administrative Director shall submit the dispute to the original medical review organization for review by a different reviewer.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 16, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

CHARLESETTA WILEY
LAW OFFICES OF ALBERT & MACKENZIE
LAW OFFICES OF GLAUBER BERENSON VEGO
DWC ADMINISTRATIVE DIRECTOR

AI/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*